***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

74-1671

B

P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1671

---

FRANK TUBBS, Pro Se

Appellant

v.

UNITED STATES OF AMERICA

Appellee

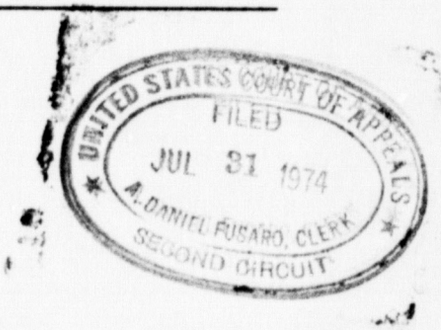
---

On Appeal From the United States District Court for the District of Connecticut

---

# BRIEF OF APPELLEE - UNITED STATES OF AMERICA

---




HAROLD J. PICKERSTEIN
UNITED STATES ATTORNEY

PETER A. CLARK
ASSISTANT UNITED STATES ATTORNEY
District of Connecticut

2

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court (Zampano, J.), filed on April 18, 1974, dismissing without hearing on the grounds of lack of jurisdiction Tubbs' petition for habeas corpus.[1] Tubbs was sentenced to a nineteen year term of imprisonment on September 17, 1970, in the District Court for the District of Connecticut, following his conviction of violations of 18 USC §2113(a) and 2113(d). He is currently serving that term in the U.S. Penitentiary, Terre Haute, Indiana.

---

[1]Tubbs' petition, filed on a standardized prison form, was captioned as a writ for habeas corpus and was treated as if filed pursuant to 28 U.S.C. §2241. While it is true that under traditional habeas jurisdictional principles habeas should lie in the forum where the prisoner and his jailer are located, the Court arguably could have construed this petition as a motion to vacate pursuant to 28 U.S.C. §2255 and ruled accordingly, since Tubbs would have difficulty proceeding by habeas corpus in Indiana because of the nature of his claims. See Canter v. Markley, 353 F.2d 696 (7 Cir. 1966). In either event, the Government submits that the petition was correctly dismissed without hearing.

## STATUTES INVOLVED

28 U.S.C. §2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

18 U.S.C. §2113(a)

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny--

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

18 U.S.C. §2113(b)

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value, exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 2113(d)

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. 2113(c)

Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

## ISSUES PRESENTED

I. Did the Court properly deny Appellant Tubbs' petition without hearing:

   A. Is a hearing necessary, under either 28 USC 2241 or 28 USC §2255, when the issue raised has been by-passed on appeal, and raised and rejected twice on the merits in previous post-conviction collateral attacks.

   B. Is a hearing necessary when the files and records of the case conclusively demonstrate the patent frivolity of the moving papers.

## ARGUMENTS

I. The District Court properly dismissed Tubbs' petition alleging trial error by virtue of withdrawal of a count of the indictment from the jury because

   A. Tubbs failed to raise the issue in the first instance on appeal, and the issue was subsequently twice rejected in rulings on motions pursuant to 28 USC §2255.

   B. The facts are not disputed and the files and records in the case conclusively demonstrate on those facts that there is no merit to Tubbs' claim.

## STATEMENT OF FACTS

On April 2, 1970, appellant Tubbs and two codefendants were indicted by the Federal Grand Jury in New Haven, Connecticut on three counts under the bank robbery statute. Count one charged violations of 18 USC §2113(a), 2(a) and 2(b); Count two, violations of 18 USC §2113(d), 2(a) and 2(b); and Count three, in which only Tubbs and one codefendant were charged, a violation of 18 USC §2113(c). (App. doc. 3). Only Tubbs went to trial on the charges, the other defendants entering pleas of guilty and testifying for the Government.

At the conclusion of the trial, the Court inadvertently charged the elements of 18 USC §2113(b) with respect to Count three (App. doc. 17, p. 878). The Court then went on to note that 18 USC 2113(c) was inconsistent with counts one and two of the indictment (App. doc. 17, p. 879) and, in view of the content of the evidence produced at trial proposed to withdraw count three from the jury (App. doc. 17, pp. 881-884). Trial defense counsel, after conferring with Tubbs (App. doc. 17, p. 884) agreed to this procedure. The Court then so instructed the jury, that count three was withdrawn because not proved by the Government, and reviewed its entire charge on the elements of counts one and two. (App. doc. 17, pp. 885-898). The jury then returned verdicts of guilty on those counts.

Tubbs appealed the convictions, not raising the issue of amendment of the indictment therein (App. doc. 4). The convictions were affirmed per curiam on April 20, 1971 (App. doc. 5). Tubbs thereafter filed two motions to vacate pursuant to 28 USC §2255, on August 24, 1971 (App. doc. 6) and on December 1, 1972 (App. doc. 8). Both motions assigned as error what Tubbs calls the "illegal amendment" of the indictment, i.e., the withdrawal of count three from the jury. Both petitions were denied (App. doc. 7, 7A, 9). Tubbs then resorted to the instant habeas corpus petition, again raising the issue of amendment of the indictment.

A. Tubbs failed to raise the issue in the first instance on appeal, and the issue was subsequently twice rejected in rulings on motions pursuant to 28 U.S.C. §2255.

Tubbs was represented on appeal by counsel who briefed and argued alleged trial errors. No issue was raised therein with respect to amendment of the indictment or the Court's charge. Post-trial collateral attack may not be used to raise issues of trial error which should be raised on direct appeal. United States v. Angelet, 265 F.2d 155 (2 Cir. 1959). Furthermore, the precise issue raised in the instant petition has been twice raised and rejected by the trial court, which precludes the necessity of further consideration of this claim. Kapatos v. United States, 432 F.2d 110, 112 (2 Cir. 1970), cert. den. 401 U.S. 909 (1971).

B. The facts are not disputed and the files and records in the case conclusively demonstrate on those facts that there is no merit to Tubbs' claim.

In addition to the procedural reasons for dismissing Tubbs' petition, it is patently obvious from the files and records included in his appendix that his claim is frivolous. In withdrawing count three from the jury's consideration, the Court rather than amending the indictment, was simply performing its required function of insuring that only those counts supported by evidence are to be considered by the jury. United States v. Nuccio, 315 F.2d 627 (2 Cir. 1963). See also United States v. Walters, 477 F.2d 386 (9 Cir. 1973), cert. den. _____ U.S. _____; United States v. Griffin, 463 F.2d 177 (10 Cir. 1972), cert. den. 409 U.S. 988 (1972)

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for post-conviction relief was properly denied without hearing and that the judgment of the District Court should be affirmed.

Respectfully submitted,

HAROLD J. PICKERSTEIN
United States Attorney

Peter A. Clark

PETER A. CLARK
Assistant United States Attorney
District of Connecticut

## CERTIFICATION

This is to certify that a copy of the Government's Brief in the above-captioned action has been mailed to Mr. Frank Tubbs, Pro Se, Reg. No. 37081-133-G, P.O. Box 33, Terre Haute, Indiana 47808, this 31st day of July, 1974.

Peter A. Clark

PETER A. CLARK
Assistant United States Attorney